IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

WAYNE SCHOOLEY and LAURIE SCHOOLEY,

Plaintiffs,

VS.

ORKIN EXTERMINATING COMPANY, INC., and ROLLINS, INC.,

Defendants.

No. 4:03-cv-40044

ORDER ON MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendants' Motion for Summary Judgment (Clerk's No. 23) and Motion to Strike the Affidavit of Dr. Joel Coats (Clerk's No. 42). A hearing on the motions was held October 22, 2004. Plaintiffs were represented by Marc Humphrey and Justin Swaim; Defendants were represented by Joseph Winner and Heather Palmer. The matter is fully submitted and ready for ruling. For the following reasons, the Court finds the motion must be granted in part and denied in part.

I. FACTS

Plaintiffs Wayne and Laurie Schooley live in Bloomfield, Iowa, in a home they acquired in 1978. In early 1992, Laurie Schooley ("Schooley")¹ suspected the home

¹ Unless otherwise noted, "Schooley" refers to Laurie Schooley.

was infested with termites. She contacted Defendant Orkin Exterminating Co., Inc., a wholly owned subsidiary of Defendant Rollins, Inc. (hereinafter referred to as "Orkin" or "Defendants").

On April 25, 1992, the parties entered into a written contract for Orkin to provide subterranean termite treatment at the Schooley residence. There were two potential guarantees, either a fully renewable guarantee, or a limited lifetime renewable guarantee. Schooley selected the Limited Lifetime Renewable Subterranean Termite Re-Treatment Guarantee, which stated,

LIMITED LIFETIME RENEWABLE SUBTERRANEAN RE-TREATMENT GUARANTEE (LC)

Subject to the limitations and restrictions set forth in this Agreement, specifically including the General Terms and Conditions below, ORKIN will issue to me a Re-Treatment Guarantee which obligates ORKIN, at no extra cost to me, to apply any necessary additional treatment to my building if an infestation of Subterranean Termites is found during the effective period of my Guarantee. I understand that ORKIN's obligation under this Guarantee is limited to re-treatment only. I expressly release ORKIN from any obligations to repair any damage to my building or its contents caused by an infestation of Subterranean Termites. This Guarantee is transferable to a subsequent owner of the premises. **DOES NOT PROTECT AGAINST FORMOSAN TERMITES.**

The General Terms and Conditions clause stated,

1. I agree that under this Agreement and my Guarantee, ORKIN is not responsible for the repair of visible damage which presently exists except damage that is described on the Inspection/Treating Report

and for which I pay ORKIN a specific charge to do the repair work. It is possible that damage may presently exist in unexposed or hidden areas of my structure in areas that can't be visually inspected. For this reason I understand that ORKIN cannot guarantee that the damage discovered by a visual inspection of my premises (and which is indicated on the Inspection/Treating Report) is all the damage which presently exists. Therefore, I specifically agree not to hold ORKIN responsible for the repair of any present damage existing in areas or in structural members of my building which are unexposed or which can't be visually inspected as of the date I sign this Agreement.

- 2. I understand that structural or mechanical problems which result in water leakage inside my building or through the roof or outside walls of my building may destroy the effectiveness of ORKIN's treatment and this could allow termites to continue to exist in my building. If such a condition is discovered, I will be responsible at my own expense for making repairs necessary to correct the structural or mechanical problem and, after I make the repairs, ORKIN will treat my building again to control the infestation in that area.
- 3. This Agreement and my Guarantee cover my building shown on the attached Inspection/Treating Report as it now exists, and if I modify, alter or otherwise change my building provide additional treatment, or adjust my annual renewal payments, or all of these. ORKIN's failure to notice structural changes during future reinspections does not release me from my obligations.
- 4. If my building has any moisture or structural conditions, which support Subterranean Termites after ORKIN's initial treatment under this Agreement, then I agree not to hold ORKIN responsible for any damage repairs.
- 5. (a) I MUST MAKE ANY CLAIM FOR BREACH OF MY GUARANTEE PROMPTLY IN WRITING TO ORKIN EXTERMINATING COMPANY, INC. 2170 PIEDMONT ROAD, N.E., ATLANTA, GEORGIA 30324. I WILL NOT BRING A LAWSUIT AGAINST ORKIN WITHOUT ALLOWING ORKIN TO FIRST ENTER AND REINSPECT MY BUILDING. I ALSO AGREE NOT TO BRING A LAWSUIT AGAINST ORKIN

- UNLESS I FILE IT WITHIN A YEAR AFTER MY WRITTEN CLAIM IS SENT.
- (b) THIS ONE YEAR LIMIT DOES NOT APPLY IF THE LAW OF MY STATE REQUIRES ORKIN TO PROVIDE ME WITH ADDITIONAL TIME TO BRING A LAWSUIT.
- 6. I agree that ORKIN's obligations under this Agreement and my Guarantee shall be cancelled if ORKIN can't perform its responsibilities because of acts of war, whether declared or undeclared, acts of any duly constituted government authority, seizure, riots, civil commotions, strikes or other labor disputes, fires, floods, storms, explosions, acts of God, failure of supplies from ordinary sources, lack of usual means of transportation, my failure to allow access to my building for any purpose specifically, including reinspection, whether the reinspection was requested by me or ORKIN, or any other reason beyond ORKIN's control.
- 7. My agreement is a consumer contract if the services ORKIN is providing to me are for my personal, family or household purposes. My three day cancellation right and ORKIN's agreement to waive its lien right on my property apply only if my Agreement is a consumer contract.
- 8. (a) All notices and other communications which I have for ORKIN or which ORKIN has for me will be in writing and sent first class mail with proper postage to my address or ORKIN's address listed on the front side of this Agreement.
 - (b) THE FACT THAT ANY ONE PORTION OF MY CONTRACT MAY BE INVALID SHALL NOT AFFECT THE VALIDITY OF THE OTHER PARTS OF MY AGREEMENT.
 - (c) I UNDERSTAND THAT THIS CONTRACT, THE ATTACHED INSPECTION/TREATING REPORT, IF ISSUED, AND THE WOODEN FLOOR REMOVAL AGREEMENT, IF ANY, ALL TOGETHER MAKE UP MY COMPLETE AGREEMENT WITH ORKIN AND THAT THIS AGREEMENT MAY NOT BE CHANGED IN ANY WAY BY ANY REPRESENTATIVE OF ORKIN OR ME UNLESS IT IS CHANGED IN WRITING AND SIGNED BY A CORPORATE OFFICER OF ORKIN EXTERMINATING COMPANY, INC. I HAVE HAD NO REPRESENTATIONS OR INDUCEMENTS MADE TO ME

EXCEPT WHAT IS WRITTEN IN THIS AGREEMENT AND ORKIN AND I WILL BE BOUND ONLY BY ITS WRITTEN TERMS.

After receiving the initial termite treatment in 1992, Orkin sent the Schooleys the renewable lifetime limited re-treatment guarantee ("Guarantee"). The information on the Guarantee included the Schooleys' property description, the type of treatment received, and the date of the initial treatment, as well as the following guarantee:

Re-Treatment Guarantee

In consideration of sums received and to be received for providing the designated treatment for the above-named wood infesting organism at the premises specified above, and subject to the Inspection/Treating Report and the General Terms and Conditions of the Agreement bearing the above-stated number, Orkin guarantees that it will, AT NO EXTRA COST, apply any necessary additional treatment to the premises if an infestation of the aforesaid wood infesting organism is found in the treated premises during the period this Guarantee is in force. ORKIN's liability under this Guarantee is limited to re-treatment only. In your Agreement, you expressly waived and released ORKIN from liability for any claim for damages to the structure or its contents occasioned by an infestation of the aforesaid wood infesting organism, or otherwise caused by ORKIN's negligence or breach of any other obligation arising under the terms of the Agreement.

Renewal and Guarantee Period

The initial period of this Guarantee shall commence on the date of initial treatment shown above. In addition to the initial period, you may thereafter, at your sole option, renew this Guarantee annually for the number of years indicated above. The Guarantee will be renewed annually upon receipt by the Company of the annual renewal fee, on or before each annual renewal date. The annual renewal fee shall be the amount

designated above, unless ORKIN exercises its right to increase the annual renewal payment after the initial period of the Agreement by giving advance written notice.

If the annual renewal payment is not made on or before the renewal date of any subsequent year, this Guarantee shall terminate as of the renewal date on which the payment is due. This Guarantee covers the premises as of the date of annual treatment and in the event the premises are structurally modified, altered, or otherwise changed after the date of the initial treatment, this Guarantee shall terminate, unless a prior written agreement shall have been entered into between you and the Company to reinspect the premises, provide additional treatment if necessary and/or adjust the annual renewal fee.

The Schooleys exercised the annual Guarantee option by making the annual renewal payment every year from 1993 through May 2002. The Schooleys allowed the Guarantee to expire in May 2003. Schooley admits she made the annual renewal payment every year but denies ever reading the terms of the Guarantee.

In 1993, Orkin reported no termite activity in the Schooley home. However, from 1994 until 2001, there were consistent reports of termite activity.² Between 1994 and 1998, Orkin responded to those infestations by spraying "Dragnet" or "Bodecare" on the premises.

² There was activity reported in each calendar year 1994-2001; the activity was either discovered by Schooley or reported by Orkin following an inspection. In March 1996, an Orkin inspection revealed termite tunnels in the east wall and center stairs of the basement. Termite tunnels were again found in the east wall and front porch of the house in June 1997. Again in August 1998, there was confirmed termite activity on the east wall of the house. In February 1999, Schooley discovered termite damage to the basement baseboards.

In 1993, the Schooleys began extensively remodeling their home. In 1993, they installed a deck, followed by steel siding in 1994, and landscaping and stone work around the foundation in 1995. In January 1997, before expanding the remodeling project to the interior of the home, the Schooleys contacted Orkin for assurances that the termite infestations had been resolved. At that time, Orkin representatives told Schooley there was no evidence of termite activity. The Schooleys decided to go forward with the comprehensive remodeling, which included a costly structural modification of the basement. Prior to remodeling, the Schooley home was appraised at \$82,000, and in September 1998, after remodeling was complete, it appraised at \$157,000.3

In February 1999, Schooley discovered termite damage to the basement baseboards. Orkin responded by installing termite "bait monitoring" stations in the earth surrounding the exterior perimeter of the house. The bait monitoring system was designed to draw termites to the buried stations and away from the structure. Activity in the stations was a "good" sign because it was indicative of termites being drawn away from the structure to the traps in the earth.⁴ While the Schooleys continued to express concern, Orkin assured them that activity in the bait monitoring stations was a

³ This appraisal was made without knowledge of chronic termite infestation.

⁴ The bait monitoring system was installed by Orkin at no additional cost to the Schooleys although this service was not covered by the Guarantee.

good thing and that this would take care of the problem.⁵ Orkin reported activity in the bait monitoring stations in May 1999, October 1999, March 2000, and June 2000.

On March 13, 2001, the Schooleys suspected termite activity in the house and called Orkin; Orkin reported termite activity in the basement stairs as well as in the bait stations. Orkin continued to monitor bait station activity; no activity was reported in April 2001, but there was activity reported in May and June, 2001. Nonetheless, on August 16, 2001, Orkin visited the Schooley home and treated the complete exterior of the house with Termidor.⁶ There has been no termite activity observed at the Schooley residence since the Termidor treatment.⁷

On January 27, 2003, the Schooleys brought the present action alleging Defendants are responsible for the extensive termite damage to their home. The Schooleys

⁵ In or around April of 1999, one of Orkin's representatives, Russell Halamar, left the Schooleys a note indicating "the problem would be resolved completely in no time." Although Orkin made this and other representations to the Schooleys regarding the effectiveness of the bait monitoring stations, evidence in the record suggests Orkin knew this process would not resolve the infestations. Further discussion regarding Orkin's knowledge of the extent and proper management of the Schooley's termite problem is presented *infra*, Part IV.C.

⁶ Orkin alleges Termidor had not been previously available.

⁷ In March 2003, three months after filing this lawsuit, the Schooleys contracted with Terminix Pest Control Service to perform a termite inspection; no new termite activity within the house was reported although Terminix did report evidence of old termite activity. Terminix did perform additional termite treatment to the Schooley property.

assert they have suffered substantial repair costs and a significant reduction in the fair market value of their property.⁸ The claims against the Defendants are Breach of Contract Ex Delicto, Breach of Implied Covenant of Good Faith and Fair Dealing, Negligent Misrepresentation, and Fraudulent Misrepresentation. Plaintiffs seek compensatory and punitive damages.⁹

Defendants filed a motion for summary judgment on June 30, 2004, alleging the undisputed material facts show that they did not breach the contract. Defendants further argue that the written contract was fully integrated and the implied covenant alleged by Plaintiffs does not exist. Defendants next argue that the undisputed material facts show they never made the negligent and/or fraudulent misrepresentation alleged by the Plaintiffs. Also before the Court is Defendants' Motion to Strike the Affidavit of Dr. Joel Coats. Plaintiffs resist both motions.

⁸ On March 22, 2004, at the request of the Schooleys' attorney, Alan Janssen drafted an opinion letter regarding the value of the Schooleys' home. Based on the inspection he performed in 1998 and on the current inspection of the exterior of the home, Janssen estimated that the marketability of the property was greatly diminished due to the damage and history of termite infestation. He opined that the loss of fair market value of the residence was estimated at 70 percent to 80 percent. He clarified that a current appraisal had not been performed.

⁹ Plaintiffs subsequently filed a stipulation of dismissal as to a fifth count for intentional infliction of emotional distress.

II. DEFENDANTS' MOTION TO STRIKE

Defendants argue Dr. Coats' affidavit is inadmissible because Plaintiffs failed to timely disclose this expert witness' testimony in violation of Federal Rule of Civil Procedure 26(a)(2)(B) and therefore the affidavit is inadmissible at trial and should not be considered on summary judgment. Plaintiffs resist this motion.

The Court is afforded considerable discretion in ruling on a motion to strike.

Nationwide Ins. Co. v. Cent. Mo. Elec. Coop., Inc., 278 F.3d 742, 748 (8th Cir. 2001). However, "the determinative question is whether an affidavit in [resistance to] a motion for summary judgment constitutes a pleading." Big Stone Broadcasting, Inc. v. Lindbloom, 161 F. Supp. 2d 1009, 1013 (D.S.D. 2001). A motion to strike is not the proper method upon which to challenge an affidavit. See id. (citing various case law and agreeing with the weight of authority which suggests affidavits are not pleadings). As the Court discussed with counsel at the hearing, when an affidavit is challenged on summary judgment, rather than strike the affidavit, the Court determines the appropriate weight the affidavit will be afforded. Accordingly, Defendant's motion to strike is denied.

III. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) states that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (quoting Fed. R. Civ. P. 56(c)).

"To preclude the entry of summary judgment, the nonmovant must make a sufficient showing on every essential element of its case on which it has the burden of proof at trial." Cont'l Grain Co. v. Frank Seitzinger Storage, 837 F.2d 836, 838 (8th Cir. 1988). Rule 56(e) requires "the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

The Court's function on a motion for summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Niagara of Wis. Paper Corp. v. Paper Indus. Union-Mgmt. Pension Fund, 800 F.2d 742, 746 (8th Cir. 1986). "On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party

opposing the motion." Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Econ. Housing Co. v. Cont'l Forest Prods., Inc., 757 F.2d 200, 203 (8th Cir. 1985). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 257. On the other hand, "[w]hen a motion for summary judgment is made and properly supported, the nonmoving party may not rely on bare allegations but must set forth specific facts showing that there is a genuine issue for trial." LeBus v. Northwestern Mut. Life Ins. Co., 55 F.3d 1374, 1376 (8th Cir. 1995).

IV. DISCUSSION

Defendants argue Plaintiffs have failed to meet their burden on each of the four claims, and therefore Defendants are entitled to summary judgment. Plaintiffs resist, arguing the factual record is replete with evidence of Defendants' liability on all the claims. The Court considers each of Plaintiffs' claims in turn.

A. Breach of Contract Ex Delicto

Plaintiffs' first claim is for breach of contract ex delicto, an action based in tort, and not in contract. Plaintiffs argue the Defendants had a duty to perform their services under the Agreement with reasonable care, and due to Defendants' breach of that duty, the value of the Schooley home was diminished.

Defendants argue that despite Plaintiffs' attempt to reshape the relationship between the parties, the relationship is based in contract. Accordingly, Defendants assert their liability is unambiguously limited by the terms of the Agreement, which declares that in the event termites were discovered Orkin was required to re-treat the premises. Defendants argue recovery is not available on the theory of breach of contract ex delicto under the circumstances of this case.

"When a contract imposes a duty upon a party, the neglect of that duty is a tort founded on contract." Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc., 473 N.W.2d 612, 615 (Iowa 1991) (citing Chrischilles v. Griswold, 150 N.W.2d 94, 98-99 (Iowa 1967). "A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person the neglect of that duty is a tort founded on contract; so that an action ex contractu for the breach of contract, or an action ex delicto for the breach of duty, may be brought at the option of the plaintiff." Chrischilles, 150 N.W.2d at 98-99 (quoting Matthys v. Donelson, 160 N.W. 944, 946 (Iowa 1917)); Duke v. Clark, 267 N.W.2d 63, 68 (Iowa 1978) ("[I]t is well settled the neglect of a duty imposed by contract is a tort for which an action ex delicto will lie.") (citing Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 228 (Iowa 1974)).

Plaintiffs assert the "duty" Defendants owed under the Agreement was to *treat* and *control* Subterranean Termites and to *apply any necessary additional treatment*.

The Court agrees that these are "terms" of the Agreement, but they do not create a separate and independent duty. The cases cited by the Plaintiffs in support of a cause of action for breach of contract ex delicto are distinguishable from the present case. In those cases, the courts looked for a separate and distinct duty that arose *out of the* contract, and not merely a term *of* the contract.

For example, in a lawsuit stemming from the death of a construction worker, the general contractor was sued, inter alia, under a negligent breach of contract theory.

Giarratano v. Weitz Co., 147 N.W.2d 824, 826 (Iowa 1967). At the close of evidence, the court directed a verdict for the defendant on the breach of contract claim. Id. On appeal, the Iowa Supreme Court determined,

[i]t appears to be well settled in Iowa that where a contract imposes a duty upon a person, the neglect of that duty is a tort, and an action ex delicto will lie. 'A tort may be dependent upon, or independent of, contract. If a contract imposes a legal duty upon a person the neglect of that duty is a tort founded on contract; so that an action ex contractu for the breach of the contract, or an action ex delicto for the breach of the duty, may be brought at the option of the plaintiff.'

<u>Id.</u> at 828 (quoting <u>Matthys</u>, 160 N.W. at 946). Under the facts of that case, the court determined a duty of safety arose under the contract and extended to the employee of an independent contractor. <u>Id.</u> at 834.

Similarly, in <u>Porter v. Iowa Power & Light Co.</u>, the question before the court was whether the contract imposed a duty of safety, and if so, did the defendants

negligently breach that duty. Porter, 217 N.W.2d at 226-27.¹⁰ Porter was a lawsuit stemming from the electrocution death of a construction worker that occurred when a crane operated by a fellow employee came too close to a power line. Id. Decedent was employed by Crees Enterprises, Inc. ("Crees"). <u>Id.</u> at 226. The City of Altoona ("City) contracted with Crees to perform paving work. <u>Id.</u> Garden Engineering Services, Inc. ("Garden") was engineer for the City employed to draw plans and specifications and then inspect the project until completion. <u>Id.</u> at 226. Plaintiff's causes of action included a breach of contract ex delicto claim against the City and Garden alleging the contract between the City and Crees created a duty of safety to decedent. <u>Id.</u> at 228. The plaintiff asserted that the duty of safety the contract imposed on Crees was extended to the City because it retained some control over the work, and to Garden as an agent of the City; therefore, Garden had a nondelegable duty to exercise such control with reasonable care. <u>Id.</u> at 229. The case proceeded to trial, but before submitting the case to the jury, the court granted Garden a directed verdict, finding it had no such duty under the contract. Id.

¹⁰ On appeal, the Iowa Supreme Court first considered whether the trial court properly determined the existence of a duty as a matter of law, or whether it was a question of fact that should have been put before the jury. <u>Porter</u>, 217 N.W.2d at 228. The court reasoned that whether a contract imposed a duty was a question of the legal effect of a contract; therefore, it was a question of law for the court, not a question of fact for the jury. <u>Id.</u>

On appeal, the Iowa Supreme Court reasoned, "the well settled rule that when a contract imposes a duty upon a person, the neglect of such duty is a tort, and an action ex delicto will lie." <u>Id.</u> at 228. The court went on to find that although such a duty may be imposed by contract, no such duty was imposed in that case. <u>Id.</u>

Finally, in <u>Preferred Marketing Associates Co. v. Hawkeye National Life</u>

<u>Insurance Co.</u>, the Iowa Supreme Court clarified that if there is separate and distinct duty that arises out of the contract and not merely a term or condition of the contract, an action in tort may lie. <u>Preferred Mktg. Assocs. Co. v. Hawkeye Nat. Life Ins. Co.</u>, 452 N.W.2d 389, 397 (Iowa 1990) (noting Professor Prosser's observations, "'Ordinarily, a breach of contract is not a tort. . . . [But] negligent performance of a contract may give rise to an action in tort, if the duty exists independently of the performance of the contract.'") (quoting W. Prosser, <u>Handbook of the Law of Torts</u> § 33, at 205 (1st ed. 1941)). The Court concluded,

Only where a duty recognized by the law of torts exists between the plaintiff and defendant distinct from a duty imposed by the contract will a tort action lie for conduct in breach of the contract. As Prosser stated: '[I]f a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not.'

<u>Id.</u> (emphasis added). The court found no relationship between the parties that gave rise to a legal duty, independent of the terms of the contract between them; therefore, the duty was found in contract, not in tort. Id.

That is precisely the case here. Plaintiffs do not assert a duty that arises out of the contract, rather they point to the terms of the contract, arguing Defendants had a duty to perform those terms with reasonable care. This assertion does not state a duty *independent* of the contract promises and thus falls within Professor Prosser's "otherwise not" reference. Accordingly, the Schooleys' cause of action for breach of contract ex delicto cannot stand.

B. Breach of Implied Duty of Good Faith and Fair Dealing

Plaintiffs' next claim asserts Defendants had an implied duty of good faith and fair dealing in the Agreement and they breached that duty in performance of the Agreement. Defendants argue this theory must be rejected as a matter of law because its contract with the Schooleys was fully integrated and Plaintiffs cannot add terms.

Under Iowa law, "an implied covenant cannot be found when the contract is fully integrated." Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 27-28 (Iowa 1978). This is inherently logical because an integrated contract provides complete parameters for defining the method, extent, and standard of performance. The normal analysis for implication of terms which the parties left unstated, but would be required for performance, logically and fundamentally does not apply when the contract is fully integrated. See id. As Plaintiffs concede the contract at issue herein is fully integrated, this would seem to resolve the issue. However, later

developing Iowa law with regard to a duty of good faith so generically defines the concept that the Court must take a further analytical step.

Giving tacit approval to the language of Restatement (Second) of Contracts § 205 (1981), the Iowa Supreme Court provided that every contract "imposes upon each party a duty of good faith in its performance and enforcement." Engstrom v. State, 461 N.W.2d 309, 314 (Iowa 1990). While not a source of relief in Engstrom, this general concept requires this Court to evaluate whether the generic principle could have application to the Schooleys' claims. The point of departure for this analysis recognizes that "[i]n order for an action for breach of implied covenant of good faith and fair dealing to lie, there must be, virtually by definition, an act of bad faith. Mere breach of contract, by itself, is not enough." Grahek v. Voluntary Hosp. Co-op. Ass'n of Iowa, Inc., 473 N.W.2d 31, 33 (Iowa 1991).

Iowa recognizes a cause of action for breach of an implied covenant of good faith and fair dealing in the insurance contract context. Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33 (Iowa 1978) ("A covenant is implied in an insurance contract that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement."). However, the Iowa Supreme Court has specifically rejected such a cause of action in employment situations. Porter v. Pioneer Hi-Bred Int'l, Inc., 497 N.W.2d 870, 871 (Iowa 1993) ("Porter also relies on a theory of implied covenant of good faith and fair dealing. We have consistently rejected that

theory in employment contract cases."). To state a claim in the insurance context, a show of "bad faith" is required. <u>Kooyman</u>, 315 N.W.2d at 33.

Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized (in other contexts) as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. 'Bad faith' under the circumstances of this case refers simply to the absence of good faith required by the implied contract.

Id. (citation omitted). At a minimum, to state a claim for breach of an implied covenant of good faith and fair dealing, a plaintiff would need to plead facts sufficient to sustain this bad faith standard. In the insurance setting, "[t]o show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988). If Iowa were to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in the present case, the Schooleys would have to assert facts that demonstrate the Defendants had no reasonable basis for their conduct and knowledge of, or a reckless disregard for the lack of, a reasonable basis.

The Schooleys assert that Defendants had discretion in performing the terms of the Agreement yet failed to treat, control, and re-treat their home as was necessary to *rid* the home of Subterranean Termites. The Schooleys also argue they reasonably

expected Orkin to be honest regarding the ongoing infestations, thoroughness of the treatment, and structural damage to their home.

These allegations fall short of bad faith. Under the terms of the Agreement,
Orkin guaranteed to provide additional re-treatment to the premises if re-infestations
were to occur. The evidence shows Orkin informed the Schooleys regarding reinfestations and re-treated those areas. They do not allege Orkin unreasonably
withheld this service or information; instead, the Schooleys allege Orkin knew they had
higher expectations yet did not do everything possible to fulfill those expectations.

These allegations do not demonstrate the Defendants lacked a reasonable basis for their
conduct. Accordingly, even if Iowa law recognized an action for breach of an implied
covenant of good faith and fair dealing with regard to a service contract, the Schooleys
have not pleaded facts to support such a claim.

Arguments surrounding the motion for summary judgment have modified the Plaintiffs' essential claims from Defendants' failure to rid the home of the termite problem to the failure of the Defendants to bring the problem under control. This modification of the argument in the core pleadings provides no more effective argument that Defendants acted in bad faith in the performance of the contract. The very terms of the service contract documents, together with the continuing presence of evidence of infestation, demonstrate an expectation that the services purchased by the Plaintiffs would require a continuing effort toward control of the problem.

The Plaintiffs' frustration with the timeliness or effectiveness of the services does not amount to bad faith on the part of the Defendants. Representations by the Defendants separate from and beyond the terms of the service contract, however, may provide a sustainable claim.

C. Negligent and Fraudulent Misrepresentation¹¹

In the final two claims against the Defendants, the Schooleys assert Orkin made fraudulent and/or negligent misrepresentations regarding the extent of the termite infestation and effectiveness of treatment they were providing.

In an action for *negligent* misrepresentation, a plaintiff must demonstrate the following:

One who, in the course of his business, profession or other employment, or in any other transaction in which he has a pecuniary interest, supplies

¹¹ Defendants suggest for the first time in their reply brief in support of the motion for summary judgment that Plaintiffs have not pleaded fraud with particularity as required under Federal Rule of Civil Procedure 9. However, the Defendants did not raise that issue on a motion to dismiss pursuant to Rule 12(b)(6). Since the Defendants raise this issue in reply on the motion for summary judgment, the Court does not address the question in terms of pleading requirements under Rule 9 but in terms of whether Plaintiffs have raised a genuine issue of material fact that precludes summary judgment on the claim or whether the Defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Although the Plaintiffs' pleadings arguably fall short of the requirement of specificity in Rule 9, it is apparent to the Court on the summary judgment record that adequate allegations could be made by amendment to satisfy the requirements of the rule, and that the Defendants are aware of the nature of the claims. The Court does not now decide if the pleadings are sufficient for trial purposes or if Plaintiffs could be precluded from using information at trial not disclosed to the Defendants in the summary judgment record.

false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 581 (Iowa 1990). An action for fraudulent misrepresentation has seven essential elements the Plaintiff must demonstrate, as follows:

(1) defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation, (7) the representation was a proximate cause of plaintiff's damages, and (8) the amount of damages.

<u>Schaller Tel. Co. v. Golden Sky Sys., Inc.</u>, 298 F.3d 736, (8th Cir. 2002) (citing <u>Gibson v. ITT Hartford Ins. Co.</u>, 621 N.W.2d 388, 400 (Iowa 2001)).

The Schooleys allege there are material issues of fact that preclude summary judgment on their misrepresentation claims. First, the Schooleys assert Orkin supplied false information regarding the termite infestation and their ability to remedy the problem. The Schooleys point to a note left by Orkin's treatment technician, Russell Halamar, assuring the Schooleys "the problem would be completely resolved in no time" and "activity has ceased." The Schooleys argue Orkin knew these statements were false at the time they were made because they were aware that the chemicals being used to treat the termites were not effective. The Schooleys offer the testimony

of Halamar, who indicated that it was known that the chemical treatment being used was ineffective to treat the infestation found at the Schooley residence.

Q: Was that successful? I mean, were you able to eliminate the problem, as best you recall?

A: I don't know if Permethrin or Dragnet FTA, or whatever, will eliminate a termite problem.

Q: Say that again?

A: The chemicals they use nowadays that are regulated by the Government aren't really all that effective, I don't believe; I never thought so, at least. Other than like back in the sixties and seventies when they used chlordane, you know how that [sic] kill anything in its wake; it would kill you. Dragnet FT or Permethrin, which is [sic] the chemicals they use now, you can drink that stuff; might give you an upset stomach, but that's all it would do, you know. I can understand why she was upset, because the house was a really nice house, and it was getting ate [sic] by termites

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The Schooleys also assert that the Defendants had a pecuniary interest in making these representations. They were paying the annual Guarantee fee to Orkin, obligating Orkin to go out to the Schooley residence to inspect and re-treat the premises. During his deposition, Halamar was asked about the inconsistency between the note he left indicating the problem would be solved in no time and the fact that he had to keep returning to the Schooley residence to re-treat because of infestations. Halamar indicated while he was not "legally able" to speak for Orkin or to tell anyone that he would solve the problem, what he meant by the note was that he would do everything he could to solve the problem. Halamar was then asked why he thought the Schooleys' termite problem was not resolved. He answered, "She is a hundred-some

miles from my office, probably. I don't know. There's probably a lot of reasons." When asked to explain, Halamar stated, "I'm one termite treater with a big territory; pretty much the state of Iowa at that time. . . . I mean, I covered a lot of territory; it was hard for me to get back and forth all the time."

The Schooleys also offer the deposition testimony of Kent Heinzman, an Orkin technician assigned to the Schooley residence from 1997 until 2002. Heinzman stated that the Schooley residence was particularly challenging in regard to treating termites because of the type of construction and the concrete subslab. He further indicated that because of this slab, termites would come up in three different spots. To address this, using chemicals available at the time, Heinzman opined that the entire premises had to be treated.

All these things at the time that we're talking about, all the chemicals that were available had to be directly applied to physically block the termites' entrance into the home. You had to cover every square inch of all activity or active infestation sites.

And if you missed any of them – Termites are very persistent insects, in that they can quite likely find other modes of entry to the structure, and without a complete and thorough treatment, you will continue to struggle to control the termites in any structure built like that with the restrictions that were placed upon us.

The Schooleys argue that despite having the knowledge that the problem could not be resolved without applying treatment to "every square inch", Orkin continued to only treat the area of infestation. Heinzman also indicated that it was inconvenient to

respond to the Schooleys' termite problem because it was a two-hour drive each way to the Schooleys' residence, and he had other customers to service.

Next, the Schooleys assert their reliance on Orkin's assurances and ability to treat and resolve the termite problem was reasonable since Orkin holds itself out to the world as an expert in termite control. The Schooleys offer Orkin's advertisement found in the 1991 and 1992 regional telephone directory which states Orkin is "world's largest in termite and pest control." The Schooleys also assert that Defendants knew they were relying on these representations since they called the Defendants before embarking on the expensive remodeling projects and asked if they should be concerned about the termite problem; they went forward with the plans based on Orkin's assurances.

The Schooleys argue that in reliance on those representations, they lost substantial use of their home, made costly home improvements, had significant repair costs because of the termite damage, and lost the fair market value of their home.

Defendants argue they are entitled to summary judgment because they never promised the Schooleys the termites would not return and that the service provided under the Guarantee was limited to re-treating the premises. Defendants further argue that they always disclosed to the Schooleys when an infestation was discovered and that the Schooleys' assertion that Orkin was lulling them into believing the termite control efforts were working is simply not the case.

Defendants further argue that Plaintiffs have abandoned the assertion that the Defendants were concealing termite activity, since the record clearly demonstrates that Defendants were reporting termite activity whenever it was discovered. Defendants aver the testimonies of Halamar and Heinzman are taken out of context and that when read in their entirety, those testimonies reveal that Defendants were using all that was available to control the Plaintiffs' termite problem. Defendants contend that predictions of success are not actionable misrepresentations. City of McGregor v. Janett, 546 N.W.2d 616, 619 (Iowa 1996) ("Mere failure of future performance cannot alone prove deceit; otherwise every breach of contract would give rise to an action for fraud."). Defendants' final assertion is that it was unreasonable for the Schooleys to rely on brief periods of termite inactivity as an indication that the termite problem had been resolved.

The Court agrees with Defendants to the extent that in the Complaint, the Plaintiffs allege the misrepresentations were Orkin's concealment or failure to reveal termite activity; but in resistance to the present motion, Plaintiffs modify their claim to assert that the misrepresentations were Defendants' assurances that the problem would be under control and would be resolved in no time, when Defendants knew this could not be true.

When viewing the facts in the light most favorable to the nonmovant, the Court cannot find the facts are undisputed as a matter of law. Plaintiffs have generated a fact question regarding the representations made to them by Defendants. While it may be

true that the testimonies of Halamar and Heinzman demonstrate the Defendants were using the chemicals available at the time, those testimonies also demonstrate that Orkin was aware of the limitations of those chemicals. Despite that knowledge, Orkin represented to the Schooleys that the problem would be taken care of in no time. While the limitations of the Guarantee may be a defense to their conduct, it does not eliminate the question of fact raised by the Plaintiffs. Orkin arguably represented to the Schooleys that they could and were taking care of their termite problem while avoiding visits to the Schooley home because it was inconvenient and costly. There is also evidence that despite Orkin's representations under the Guarantee that it would inspect the premises, Laurie Schooley was often the one that discovered the re-infestations and had to call Orkin to come out to the property.

The Court also agrees with Defendants that a prediction of success is not actionable. However, as the court reasoned in <u>City of McGregor v. Janett</u>, the deliberate conveyance of a message while knowing it is not true is actionable. <u>Id.</u> Orkin admits the chemicals available at the time had limitations. In addition, Orkin does not dispute the testimony of Heinzman that the Schooleys' infestation was severe and that given the type of construction, it would have required that those chemicals be applied to every square inch of the premises. Orkin admits this never occurred. Under the circumstances, a jury could find the results Orkin suggested the Schooleys could expect were made while knowing that the re-treatment being provided could not produce those results. This leaves a question of fact regarding the representations made to the

Schooleys. On a motion for summary judgment, this question must be resolved in favor of the nonmovant. Wells Fargo Fin. Leasing, Inc. v. LMT Fette, Inc., 382 F.3d 852, 856 (8th Cir. 2004) ("We view the facts and the inferences to be drawn from them in the light most favorable to the nonmoving party.").

V. CONCLUSION

The Court finds that a genuine issue of material fact remains on the misrepresentation claims. However, the Schooleys have failed to demonstrate legally and factually supportable claims of breach of contract ex delicto and breach of an implied covenant of good faith and fair dealing. Accordingly, Defendants' motion for summary judgment (Clerk's No. 23) must be **granted in part and denied in part**: the motion is **granted** as to Counts I and II and **denied** as to Counts III and IV. In response to the motion for summary judgment, Plaintiffs stipulated to the dismissal of their claim of intentional infliction of emotional distress; accordingly, the motion is **granted** as to Count V. As stated above, Defendants' Motion to Strike (Clerk's No. 42) must be **denied**.

IT IS SO ORDERED.

Dated this 29th day of November, 2004